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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 390

ROOSEVELT WARD, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

JOHN M. COE,
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The opinion of the Court of Appeals is reported at 195 F. 2d 441.

Jurisdiction

Petitioner was indicted in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, for violation of the Selective Service Act of 1948. The first count of the indictment, charging that the petitioner did knowingly fail to comply with an order to report for induction, was dismissed at the Government's request at the close of the evidence. Trial on the second count, charging that he "did unlawfully and knowingly fail to furnish said local board his correct address where United States mail might be delivered to him, as

required by law", resulted in a conviction and a sentence of imprisonment for three years. This judgment of conviction was affirmed by the United States Court of Appeals for the Fifth Circuit. This Court has granted certiorari to review the judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. 1254 (1), which is Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of the Case

On September 18, 1948, petitioner registered with Selective Service Local Board No. 45 in New Orleans, giving as his residence address 2309 Upperline Street, New Orleans, Louisiana, where he lived with his parents. (R. 11) Mrs. Dorothy Ward, his mother, was listed as the person who would always know his whereabouts. (R. 11) He gave his occupation as student. He gave as his place of study the last institution at which he had been in attendance, Wilberforce University, Wilberforce, Ohio. (R. 58) This information was entered by the clerk on the line labeled "name and address of employer", this being the most appropriate place on the form. (R. 57)

Thereafter, in 1949, petitioner left New Orleans to work in New York. He planned to live at first with his aunt, Mrs. Vivian Short, and he left that address with his mother. (R. 47, 59) He testified that he did not furnish his local board with his aunt's address because he expected to be there temporarily, and because he had left that address with his mother as his forwarding address. (R. 50)

On June 7, 1949, the board sent a draft questionnaire to petitioner at 2309 Upperline Street, New Orleans. (R. 15, 16) For reasons which do not appear from the record, this questionnaire was not returned to the board (R. 16), and on

October 18, 1949, the board sent a letter of inquiry to petitioner at the New Orleans address. (R. 15, 16)

On March 21, 1950, the board sent a duplicate questionnaire to petitioner at the same address. (R. 15) Petitioner's mother forwarded this questionnaire to him, in care of his aunt at 204 W. 149th Street, New York, N. Y. (R. 42) Petitioner's father, fearing that the forwarded questionnaire would not reach his son in time if he was no longer living with his aunt, thereupon went to New York to make sure that the form reached petitioner. (R. 53, 54) Petitioner had received the questionnaire, however, and on March 30, 1950, he returned it, filled out, to the board. (R. 17)

On this questionnaire he informed the board that his current residence was 72 W. 107th Street, New York, New York, and that the name and address of his employer was "N. Y. Organizing Committee for Labor Youth League, 799 Broadway, N. Y. C." (R. 33)

On April 28, 1950, notice that he had been classified A-1 was sent to petitioner at 72 W. 107th Street (R. 19) and he received this notice. (R. 63)

On January 15, 1951, an order to report for a physical examination was mailed to petitioner at 72 W. 107th Street. (R. 19, 20) This notice came back to the local board stamped, "Returned to sender. Removed. Left No address."

On January 25, 1951, the board wrote petitioner's mother in New Orleans requesting information as to his whereabouts. (R. 21, 22) On January 31, she replied: "In reply to your letter about Roosevelt Ward Jr., I haven't heard from him and don't know where he is located. His last address that I know was 204 W. 149th Street, New York City. Since then I haven't heard from him. Very truly yours, Mrs. Dorothy Ward." (R. 26)

A letter was then mailed to petitioner at 204 W. 149th Street and came back stamped, "Not at address given." (R. 27, 28)

The board then wrote to Wilberforce University, which replied that petitioner was not registered there and suggested that the board write to the College of Education and Industrial Arts, Wilberforce, Ohio. (R. 24) This was done, and that institution replied that petitioner was no longer registered there, but that he had been enrolled during the school year 1946-47. (R. 25)

On March 26, 1951 the board mailed an Order to Report for Induction to petitioner at 72 W. 107th Street which, like the communication sent to the same address two months before, was returned marked, "Return to sender. Moved. Left no address." (R. 29, 36)

The chief clerk of the board conceded (R. 34) that no effort was made to reach petitioner at the Labor Youth League, 799 Broadway, which he had supplied to the board as his place of employment on the questionnaire returned in March, 1950. (R. 33)

The board then reported petitioner to the United States Attorney as a draft delinquent. (R. 30, 31) On May 31, 1951, petitioner was arrested, being found without difficulty at his place of employment, the Labor Youth League, at 799 Broadway. (R. 44) On June 19, 1951 an indictment was returned against petitioner charging, in the first count, failure to report for induction, and in the second count, failure to keep the board advised of his address between the dates of March 30, 1951 and May 31, 1951. (R. 2)

At the trial petitioner took the stand and testified in substance as follows: Throughout his stay in New York housing problems compelled him to change his residence frequently (R. 54, 61, 62) He stayed with his aunt temporarily upon his arrival (R. 50) and thereafter he lived in several

different Harlem rooming houses during the next two years. (R. 52, 54)

Because of the temporary nature of his residences, he used his office address as his principal address for the receipt of mail. (R. 46) He introduced (R. 47) seven postmarked envelopes (Exh. D-1, R.) which had reached him at his business address (c/o Labor Youth League, 799 Broadway, New York City) at the time that his local board was attempting to contact him. Petitioner testified that these letters represented only a small portion of the mail received by him at 799 Broadway. (R. 65)

(The prosecution made no attempt to contradict petitioner's proof that mail in substantial quantity did reach him at his place of employment. At one point the transcript of his cross-examination reads: "Did you ever speak to the boss man?", to which he replied, "No, I never did." (R. 62) The line of questioning in which this question appears was directed to determining why a letter sent by the board to petitioner at his aunt's apartment had not reached him while other mail had reached him there. It is perfectly clear from the context that the question which was asked, and misunderstood by the stenographer, was: "Did you ever speak to the postman?")

Petitioner frankly admitted knowledge of Selective Service regulations requiring that the local board be kept informed of the address at which mail could reach him. (R. 55) He believed, however, that he had complied with this requirement by supplying to the board his office address at which he could easily be reached, and which remained the same from 1949 until the time of his arrest at that address in 1951. (R. 55) This belief was strengthened by the fact that petitioner's roommate was contacted by the board at the latter's place of employment, which led petitioner to believe that this was the practice. (R. 65) It

was because of this belief that he did not furnish the board with his temporary residence addresses. (R. 55-57)

Petitioner relied also on the fact that the board had his parent's address, and that they in turn had his aunt's address. (R. 50, 51) He received mail, including the draft questionnaire, at his aunt's apartment even after he was no longer living there. (R. 60) He called at his aunt's apartment from time to time to pick up mail which had been forwarded to him there. (R. 60)

(The board did send one communication to petitioner at his aunt's address, 204 W. 149th Street, which was returned marked, "Not at address given." (R. 27) The record contains no explanation of why this letter did not get delivered to petitioner's aunt to be held for his next visit, but if counsel may be permitted a surmise, what probably happened is this: The letter from the board (R. 28, Exh. G-14,) was addressed simply "Roosevelt Ward, Jr. 204 W. 149th St."—not "c/o Mrs. Vivian Short." It seems likely that the postman simply forgot that a man named Ward had boarded temporarily in Mrs. Short's apartment, and finding no such name on the mailbox, returned the letter.)

Petitioner was asked if he would have complied with an order to report for induction had he received one and he answered, "I would have immediately complied." (R. 48). He was also asked:

> "If given the opportunity to comply would you be willing now to enter into the performance of your duty?" (R. 48)
>
> "Have you at any time since your release from custody presented yourself at the office of the Draft Board and made an effort to become inducted into the Service?" (R. 48, 49)

But objections to these questions were sustained (R. 49) and petitioner was not permitted to answer them.

At the completion of the proof, the prosecution conceded that the evidence showed that petitioner had in fact not received his notice to report for induction and the Government thereupon abandoned the first count of the indictment. (R. 69) Counsel for defendant moved for judgment of acquittal on the second count, which was denied. (R. 72). The second count resulted in a conviction and a sentence of imprisonment for three years. (R. 83)

Specification of Errors

The Court of Appeals erred in holding that there was sufficient evidence in the record to support the conviction and in holding that the defendant's motion for judgment of acquittal at the close of the case was properly denied.

Summary of Argument

Petitioner was charged with violating a statute and regulations which required each registrant "to keep his local board advised at all times of the address where mail will reach him". Title 32 C.F.R. Sec. 1641.3 Neither the statute nor the regulations specify that the registrant must keep the board informed of his *residence* address. Petitioner advised the board of his office address, which remained constant. The board made no attempt to reach petitioner at this address. The record contained uncontradicted proof that mail in substantial quantity could and did reach petitioner at his office. (R. 47, Exh. D-1, R.) The Government introduced no proof that petitioner's office address was not an address where mail would reach him. Therefore there was no proof whatsoever on an essential part of the Government's case, and submission to the jury was improper. (Point I)

The holding of the Court of Appeals that there was sufficient evidence to sustain the conviction cannot be rec-

onciled with the decision of this Court in *Bartchy* v. *United States*, 319 U.S. 484 (1943), or with the other Court of Appeals decisions interpreting the statute and regulations here involved. (Point II)

The due process clauses of the Constitution have been interpreted to require that criminal statutes define the crime created with sufficient specificity so that the citizen can determine the proscribed conduct. The statute and regulations here involved make no mention of residence address. They advise the registrant only that he must keep the board informed of *the address* where mail will reach him. The court below has in effect held that petitioner was required to keep the board advised of his *residence* address. So interpreted, the statute and regulations, and petitioner's conviction thereunder, violate the due process clause of the Fifth Amendment to the Constitution. (Point III)

The board's last attempt to contact petitioner was made prior to the start of the period covered in the indictment. No effort was made to reach petitioner at any address during the time specified in the indictment. In view of this fact, the Court of Appeals erred in approving submission of the case to the jury. (Point IV)

Point I.

The board made no effort to reach petitioner at the latest employment address supplied by him. Therefore the Government's proof was incomplete, and the case should not have been allowed to go to the jury.

The second count of the indictment, which resulted in judgment of conviction, was based on Sections 12(a) and 15(b) of the Selective Service Act of 1948, 62 Stat. 622, 624 50 U.S. Code (Appendix) Secs. 462(a), 465(b), and

the regulations promulgated thereunder. The statute provides, in pertinent part, as follows:

> "12(a) Any . . . person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title, or rules, regulations or directions made pursuant to this title . . . shall upon conviction . . . be punished by imprisonment of not more than five years or a fine not more than $10,000 or by both such fine and imprisonment . . ."
>
> "15(b) It shall be the duty of every registrant to keep his local board informed as to his current address and changes in status as required by such rules and regulations as may be prescribed by the President."

The regulations prescribed by the President pursuant to this section provide (Title 32 C.F.R. Sec. 1641.3):

> It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him".

(1)

It will be noted that in neither the statute nor the regulation is there any requirement that the address furnished be the registrant's residence address. The prosecution sought to prove the crime charged solely by means of evidence of efforts made to contact petitioner through the mails. But the Government's witness conceded (R. 34) that no effort was made to reach petitioner at his latest business address, (the office of the organization by which he was employed) supplied to the board on his questionnaire in March 1950.

Nor did the Government attempt to prove in any other way that this address, 799 Broadway, New York City, was not in fact an address where mail would reach the peti-

tioner. On the contrary, the record contains uncontradicted and incontrovertible evidence that mail could and in fact did reach petitioner at his office address during the very months when the Board was seeking to contact him. (See seven postmarked letters, R. 47, Exh. D-1,)

Petitioner testified (R. 65) that these letters represented only a small portion of the mail which had reached him at his office, these being the envelopes he happened to have saved. Common experience serves to confirm that testimony. How many of us could produce more than a half dozen old envelopes when called on to do so without notice?

We submit that the Government has not completed its proof in a prosecution of this sort unless it has introduced some evidence bearing on each of the current addresses supplied by the defendant. Obviously this proof does not necessarily have to be by way of attempts to reach petitioner through the mails. The prosecution might prove by testimony that there was no such address, or that petitioner was not known at that address.

But in the case at bar none of these methods was used to prove that petitioner's office address was not an address where mail would reach him. In fact the Government's own witness, an agent of the Federal Bureau of Investigation, testified that he had no difficulty finding petitioner at 799 Broadway on May 31, 1951. (R. 44) This date is the last day of the period covered by the indictment, which charge that between the dates of March 30, 1951 and May 31, 1951 petitioner failed "to furnish said local board his correct address where United States mail might be delivered to him." (R. 2) In other words the Government's own proof showed that petitioner could be reached at 799 Broadway during the period covered by the indictment.

We submit that even if no other factors were present

it would have been error to submit the case to the jury on this proof.

(2)

And other substantial factors *were* present. Petitioner was charged not simply with failing to perform a statutory duty, but with doing so "knowingly". Bearing on this question, petitioner testified that he neglected to keep the board abreast of his current residence address because that address changed frequently, but that he relied on what he believed to be the practice of draft boards to contact registrants at their place of employment if they could not be reached at home. (R. 55) This practice came to petitioner's attention when his roommate was contacted at work by the latter's local board. (R. 65)

That this was in fact the general practice is indicated by the regulations, which provide (Title 32 C. F. R., Sec. 1642.41 (b)):

> "In endeavoring to locate and to secure the compliance of a delinquent *prior to reporting him to the United States Attorney,* the Local Board shall contact the delinquent and the employer, or 'person who will always know' the delinquent's address as shown on Registration Card (SSS Form No. 1), or other person likely to know his whereabouts." (Emphasis supplied.)

And that it was the practice of petitioner's board to attempt to contact registrants at their place of employment is indicated by that board's conduct in this very case. The Board wrote to petitioner at Wilberforce University, the place of employment which he had given them upon registration in 1948. (They did not, however, write to him at the employment address which he supplied more than a year and a half later, on the questionnaire filed in 1950—799 Broadway.)

But in any event the jury could not reach the question whether petitioner committed the offense charged "knowingly" until they had decided whether he committed the objective offense charged—failing to keep his draft board advised of the address where mail would reach him. On this question the prosecution's case was incomplete because no evidence was introduced—and none could have been—that provided any basis for finding that petitioner could not be reached at his office. Therefore the trial court should have granted the motion for Judgment of acquittal at the close of the proof, and the appellate court below should have so held.

(3)

In sum, the prosecution set out to prove that petitioner knowingly failed to keep his local board advised of the address where mail would reach him. This proof consisted, as it naturally would, of evidence as to the efforts made by the local board to reach petitioner through the mails. The Government did not attempt in any other way to prove the crime charged. We submit that there must be at least some evidence bearing on the incorrectness of each address furnished by the registrant to the board (and which has not been superseded by a later address supplied by the registrant). Where, as in the case at bar, the Government offers no evidence at all as to one of the addresses supplied by the registrant (supplied on the board's own questionnaire), it would seem clear that the Government has not proved its case. When the record also contains, as here, proof, in the form of postmarked letters, that mail did reach the defendant at this address, and testimony by defendant that he expected the board to reach him at this address, the evidence seems without question insufficient to support a conviction for failure to keep the board advised of "the address where mail will reach" defendant.

Point II

The holding of the Court of Appeals cannot be reconciled with the decision of this Court in *Bartchy* v. *United States* 319 U.S. 484 (1943), or with other Circuit Court decisions.

(1)

In *Bartchy* v. *United States,* 319 U.S. 484 (1943) defendant, a seaman, was advised by his local board on February 4th that his induction would probably take place in twenty or thirty days. On February 10th he advised the board by letter that he was shipping as a seaman on a voyage from Houston to New York.

> "In the letter he suggested deferment from induction into military service on the ground of employment in the merchant marine and requested that in case deferment was granted it be addressed to 8045 Harrisburg Boulevard, Houston. This was the office of the National Maritime Union and was different from his address, 7543 Harrisburg Boulevard, previously given the board. Bartchy arranged with the Houston office of the union to forward his induction notice to the union's New York office." (319 U.S. at 486).

An induction notice was sent to the Houston office of the union and was forwarded to the New York office but through an error on the part of an official in the New York office was returned to the board. The petitioner was convicted for failing to keep his local board advised of the address where mail would reach him—and sentenced to imprisonment for sixty days. The conviction was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 132 F. 2d 348. This Court granted certiorari, and reversed on the ground that the evidence was not sufficient to support the

conviction. The Court held, through Mr. Justice Reed (Stone, Ch. J., & Roberts, J. dissenting):

> "We think the Government correctly interprets the Act, section 11, and the regulation, section 641.3, not to require a registrant who is expecting a notice of induction to remain at one place or to notify the local board of every move or every address, even if the address be temporary. The Government makes the point, however, that a registrant with knowledge, as here, of the imminence of the posting of the notice is plainly obligated to keep in close communication with the forwarding address. If this suggestion is meant as a rule of law that at his peril the registrant must at short intervals inquire at his last address given to the board, here 7543 Harrisburg Boulevard, Houston, or at his own forwarding address, here the Maritime Union in New York, we are of the view that the Government demands more than the regulation requires. The regulation, it seems to us, is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail, sent to the address which is furnished the board, may be by the registrant reasonably expected to come into his hands in time for compliance.
>
> • • • • • • •
>
> "The petitioner left with the board an address which in regular course of mail should and did bring the notice to the harbor where petitioner was located. . . . On arrival there he went to his forwarding address, inquired for mail, told the official in charge he was expecting an induction notice and arranged for notification to him by the union of its arrival. Bartchy failed to receive the notice because of the mistake of the official of the union . . .
>
> "Petitioner might have been more diligent by telephoning or calling at the union at intervals between the twenty-fifth of February and the tenth of March but we conclude that he was justified in relying upon the efficiency of this experienced organization to ad-

vise him of the arrival of the notice." (319 U.S. at 488-490).

In the case at bar, petitioner did far more than supply the Board with the first link in a chain of forwarding addresses. He furnished an address where mail could, and from the uncontradicted evidence in the record did reach him directly. The board made no attempt to reach him at this address. We submit that under the holding of this Court in *Bartchy* v. *United States, supra,* the evidence in the record was insufficient to support the conviction and the Court of Appeals erred in holding otherwise.

(2)

The interpretation which the court below has placed on Regulation 1641.3 also cannot be squared with the interpretation placed on its identical predecessor by the Court of Appeals for the Second Circuit in two cases which, although not directly in point, take a far different view of the obligations imposed on the registrant.

In *United States* v. *Trypuc,* 136 F. 2d 900 (1943), the only address which defendant gave at the time of registration was that of his brother in Patchogue, New York, where defendant was living at the time. Thereafter he moved to Brooklyn, New York, without advising his board or his brother of his forwarding address. His brother refused to accept letters sent by the board. In reversing a conviction for errors in the charge, the Circuit Court of Appeals wrote, *per curiam,* (136 F. 2d at 902):

> "Similarly in the case at bar the address furnished the board would seem to suffice if Trypuc, in good faith, kept in touch with his brother by telephone while working in Brooklyn and believed that his brother would hold for him any communication sent by the board."

In *United States* v. *Haug*, 150 F. 2d 911 (1945), a unanimous court, Judge Learned Hand writing, held that the defendant could fulfill his duty under the regulations by supplying the board with the address of the Seaman's Church Institute, where mail would be held for him, providing he intended to call there for his mail from time to time.

Point III

The statute and regulations as in effect interpreted by the court below fail to define clearly the crime created and thereby violate the due process clause.

The only theory on which the conviction in the case at bar can be upheld is that the courts below in effect interpreted the statute and regulations to require that the registrant keep the board advised of the *residence* address where mail would reach him. On no other theory could the case have been submitted to the jury where the record contained the Government's concession that no attempt had been made to reach petitioner at his office address (R. 34), no proof of any kind that mail would not reach him there, and undisputed evidence introduced by petitioner that he did receive mail there.

But as has been pointed out neither the statute nor the regulations specify that a *residence* address must be supplied. Therefore the Court of Appeals has in effect interpreted the statute and regulations in such a way as to render them impermissibly vague as part of a statutory scheme creating a crime. This Court has repeatedly held that "Laws which create crimes ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." *United States* v. *Brewer*, 139 U. S. 278, 288 (1891). A law which fails to define clearly the conduct forbidden or required deprives the defendant of due process. *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921).

In *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926), the Court states the law in these words (at p. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

We submit that the statute and regulation as in effect interpreted by the court below violate the due process clause of the Fifth Amendment by failing to define clearly the criminal offense created.

Point IV

No effort was made to reach petitioner at any address during the period specified in the indictment.

The indictment charged that "between the dates of March 30, 1951 and May 31, 1951" petitioner "did unlawfully and knowingly fail to furnish said local board his correct address where United States Mail might be delivered to him . . ." (R. 2). When the record is examined, it appears that the Government did not prove even one attempt to reach the petitioner during the two-month period covered by the indictment. All of the efforts to contact petitioner were made prior to March 30, 1951.

At the close of the evidence counsel for the defendant moved the trial court

> "to instruct the jury to disregard and strike out all of the evidence relating to the failure to notify the Draft

> Board of changes of address which occurred prior to March 30, 1951, and also move the Court separately to instruct the jury to disregard and strike out all of the evidence relating to non-receipt of communications from the Draft Board prior to March 30, 1951" (R. —).

The motion was denied on the ground that this evidence bore on the question of whether defendant *knowingly* failed to keep his local board advised of the address where mail would reach him (R. 71). But before the jury could reach the question of the defendant's knowledge or intent, they must first have found that during the period covered by the indictment he committed the objective offense charged. On this question, however, there was no direct evidence in the record, since the local board never attempted to reach defendant during the period covered in the indictment.

One can guess—as the jury was required to do—at the results of an attempt to contact petitioner by mail during April and May of 1951. Perhaps the board would have had no greater success than they had had earlier. Or perhaps petitioner's mother would have been able to supply the board with his then current temporary residence address. Or perhaps a letter addressed to petitioner at his aunt's apartment would have reached him, as other mail had (R. 60, 61, 62).

In short, we cannot tell with certainty at what address (other than his office address, which remained constant) mail would have reached petitioner during April and May of 1951, because the board sent him no mail during these months. For this reason, in addition to those discussed earlier, the prosecution failed to prove the offense charged, and the Court of Appeals erred in holding that the evidence was sufficient to support the conviction.

Conclusion

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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